Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DEXTER J. KAMILEWICZ, *et al.*,

Petitioners,

vs.

BANK OF BOSTON CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICI CURIAE LAW TEACHERS IN SUPPORT OF PETITION AND MOTION FOR LEAVE TO APPEAL

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22 pp

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to this Court's Rules 21 and 37, the law teachers listed in the Statement of Interest below move for leave to file the following brief in support of the petition for certiorari in this case. Consent to the filing of this brief has been obtained from the Petitioners and from Respondents Bank of Boston Corporation, Bancboston Mortgage Corporation, Burr & Forman, and T. Thomas Cottingham, but not from the other Respondents. The *amici* set forth their interests and reasons for seeking to file this brief in the Statement of Interest below.

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STATEMENT OF INTEREST

The *amici* whose names follow are law teachers, teaching Civil Procedure, Federal Courts, and other subjects. We list our schools only for purposes of identification:

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Jack Beermann, Boston University School of Law
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Mary Twitchell, University of Florida College of Law
Rhonda Wasserman, Pittsburgh University School of Law
Charles W. Wolfram, Cornell Law School

We urge the Court to hear this case because of the large and undesirable changes that the decision below effected, not only in the *Rooker-Feldman* doctrine, but also in the law of personal jurisdiction, class actions, and res judicata. Although this brief will focus on the unusual importance of the issue presented for review, we also believe that the result below was erroneous, for substantially the reasons stated in the dissent of Judge Easterbrook (joined by four other judges) from denial of rehearing *en banc*.

Although only the *Rooker-Feldman* ground on which the lower courts relied is now before this Court, we also believe that the Petitioners have set forth substantial claims on the other issues in this case. These claims include those that: (a) the Respondents committed actionable wrongs; (b) the Alabama court that approved settlement of the *Hoffman* class action lacked personal jurisdiction over Petitioners because they lacked contacts with Alabama, because the settlement subjected their mortgage accounts to a net disbursement and thus failed to bring the case within *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and because they did not receive constitutionally adequate notice of that; (c) the Petitioners are not bound by that class action settlement because they received no constitutionally adequate representation or notice; and (d) Alabama res judicata law, applicable in federal court under 28 U.S.C. § 1738, does not bar this action. We therefore urge that this Court review the lower Court's judgment.

ARGUMENT

The Seventh Circuit panel's expansion of the *Rooker-Feldman* doctrine to cover this case disrupts not only that doctrine but also interrelated doctrines governing the effect of civil judgments. In effect, the Court held that federal courts may not hear an action charging class action lawyers and others with malpractice, fraud and other misconduct because this would

amount to a federal "appeal" from a state court order approving the class action settlement and the lawyers' fee award, even if that order was reached without personal jurisdiction over the federal plaintiffs, and without their interests having been properly represented. The result will be to eliminate several traditionally recognized grounds for collateral attack on unconstitutionally grounded judgments, and to create what amounts to a broad, federal-judge-made system of res judicata for the effect of state court judgments in federal courts, in violation of 28 U.S.C. § 1738.

1. The decision below conflicts with the traditional rule that a party is not bound by a judgment entered without personal jurisdiction when that party did not participate in the challenged proceedings. It has long been settled, of course, that judgments reached without personal jurisdiction are not entitled to full faith and credit in other courts,[1] including federal courts.[2]

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[1]*E.g.*, Underwriters Nat'l Assur. Co. v. N.C. Life Ins. Guaranty Ass'n, 455 U.S. 691, 704-05 (1982); Hanson v. Denckla, 357 U.S. 235, 255-56 (1958); Flexner v. Farson, 248 U.S. 289 (1919); Nat'l Exchange Bank v. Wiley, 199 U.S. 257 (1904); Bell v. Bell, 181 U.S. 175 (1901); D'Arcy v. Ketchum, 52 U.S. 165 (1851); Restatement, Second, Judgments § 81.

[2]*E.g.*, Durfee v. Duke, 375 U.S. 106 (1963); Pennoyer v. Neff, 95 U.S. 714 (1878); Hall v. Lanning, 91 U.S. 160 (1875); Knowles v. Gaslight & Coke Co., 86 U.S. 58 (1873); Thompson

The Court below, however, concluded that the *Rooker-Feldman* doctrine forbids federal collateral attack (which it construed this case to be) even by parties who never appeared in state court on state court judgments rendered without personal jurisdiction.

Although the lower court's holding applies only to federal courts, it would nevertheless bar collateral attack in many cases. A plaintiff who has obtained a state court judgment without jurisdiction over the defendant need only bring an action to enforce that judgment in federal court. Under the decision below, *Rooker-Feldman* would then block the defendant's attempt to challenge the underlying judgment because the federal court would have no jurisdiction to adjudicate such a challenge. The same result could follow if the defendant in the original action filed a state court action collaterally attacking the original judgment and the other party were able to remove the case to federal court. In effect, federal courts would give full faith and credit to state court judgments lacking personal jurisdiction, and the traditional rule under which such judgments do not bind would apply only when the victimized defendant could somehow keep any challenge to the judgment out of federal court.

The only justification for such a result suggested by the Court below--that this case does not involve a default judgment--

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v. Whitman, 85 U.S. 457 (1873); *see* Simon v. Southern Ry., 236 U.S. 115 (1915)(defendant not served in state court suit may sue in federal court to enjoin enforcement of judgment).

misapprehends the reason for treating judgments without personal jurisdiction as nonbinding. The Petitioners in this case can challenge the personal jurisdiction of the Alabama court over them because *they* never appeared in the Alabama court, and are hence not bound by any decision that court rendered as to its own jurisdiction. It is irrelevant to the rights of these Petitioners that other class members may have appeared. This is like a case in which one of two defendants appeared in a state court but the other did not: the second defendant is clearly entitled to challenge the rendering court's personal jurisdiction over it. *E.g.*, Hall v. Lanning, 91 U.S. 160 (1875).

The Court's decision thus cuts back an opportunity for collateral attack that is one of the columns on which personal jurisdiction law rests. It is of little avail for this Court to declare that a defendant has a Constitutional right not to litigate a given dispute in an Alabama court, if that right can be asserted only by going to an Alabama court to raise a jurisdictional defense. Without the opportunity to contest the binding effect of a judgment, defendants will be forced to appear in unconstitutional forums--and some plaintiffs will be encouraged to press their choice of forum beyond Constitutional limits.

2. The decision below conflicts with the rule that a class member is not bound by a class action judgment in which the member received inadequate representation. Like the

personal jurisdiction rule, this one is grounded in the Due Process clause and is well established.[3] The right it confers can be exercised either in the original forum or in another.[4] Yet the Court declined even to consider the merits of Petitioners' claim of inadequate representation because doing so "would run directly into the state court finding, entered after a two-day fairness hearing--that the fees were reasonable." Of course, that is the very finding that the Petitioners claim denied them due process because the lawyers purporting to represent the class instead pursued their personal interests in obtaining an attorney fee so large that class members wound up with net losses.

The Court's decision thus bars collateral attack (which it considered this case to be) on a state court class action judgment whenever the party benefitting from the judgment can get the case into a federal court. For example, a plaintiff securing a judgment against a defendant class could then bring federal court

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[3]*E.g.*, Richards v. Jefferson County, 116 S. Ct. 1761 (1996); Hansberry v. Lee, 311 U.S. 32 (1940); Restatement, Second, Judgments § 42; *see* Kremer v. Chemical Construction Corp., 456 U.S. 461, 480-83 (1982).

[4]Matsushita Elec. Indus. Co. v. Epstein, 116 S. Ct. 873, 888 (1996)(Ginsburg, J., concurring); Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), cert. dismissed, 511 U.S. 117 (1994); In re Real Estate Title & Settlement Services Antitrust Litigation, 474 F.2d 67 (3d Cir. 1989); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

enforcement actions against class members falling within diversity jurisdiction without fear of due process challenges.

The result is to undermine a vital safeguard for the integrity of class actions. Such actions constitute an exception to the usual principle that one can constitutionally be bound only by a judgment to which one is a party.[5] The exception is sound, but it does raise the possibility--realized in this case--that those participating in the action will misrepresent or abuse class members. For class actions to fulfill their important functions, class members must have a reasonable opportunity to keep the system honest by challenging the Constitutional adequacy of their representation.

3. The decision below stretches the *Rooker-Feldman* doctrine into a free-floating bar to federal actions involving allegations inconsistent with a state court finding. *Rooker-Feldman* has heretofore been a limited doctrine that prohibits a party to a state court judgment from bypassing this Court's appellate jurisdiction by seeking to overturn that judgment in a new

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[5]*E.g.*, Richards v. Jefferson County, 116 S. Ct. 1761 (1996); Hansberry v. Lee, 311 U.S. 32, 40 (1940); Postal Telegraph Cable Co. v. Newport, 247 U.S. 464 (1918); *see* Martin v. Wilks, 490 U.S. 755 (1989).

federal court action.[6] It has been based, not on some expansive policy, but simply on 28 U.S.C. § 1257, the statute that authorizes appellate review by this Court, and that contains no explicit language limiting other remedies. In at least three ways, the Court's decision in this case inflates this doctrine.

(a) Like the United States in *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), the Petitioners in this case could not have appealed to this Court from the relevant state court judgment; they were not named plaintiffs but mere class members. As in *De Grandy*, therefore, there is no question of the circumvention of this Court's appellate jurisdiction that *Rooker-Feldman* is meant to prevent. Of course, the Petitioners would have become able to appeal had they successfully sought to intervene in the Alabama class action and raise objections there--but the same was true of the United States in *De Grandy*, where the *Rooker-Feldman* doctrine was held not to apply. Other authority supports this principle.[7]

(b) The lower courts stretched *Rooker-Feldman* to govern even when the state judgment in question was reached without

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[6]Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); *see* Asarco v. Kadish, 490 U.S. 605 (1989).

[7]*See* Martin v. Wilks, 490 U.S. 755 (1989)(nonparty not bound even though it had chance to intervene); Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431 (1934)(allowing federal suit by nonparty to state judgment); Valenti v. Mitchell, 962 F.2d 288, 297-98 (3d Cir. 1992)(*Rooker-Feldman* does not bar nonparty).

personal jurisdiction over Petitioners and was also not binding on Petitioners because they were not adequately represented. But the premise of *Rooker-Feldman* is that the judgment of a court that "had jurisdiction of both the subject matter and the parties" may be challenged only by appeal. *Rooker*, 263 U.S. at 415. It has not until now been thought to limit the right of a party not bound by a state court judgment to invoke the jurisdiction conferred on the federal courts by Congress. As already noted, the Seventh Circuit panel's expansion of *Rooker-Feldman* threatens to dislocate the Constitutional law of both personal jurisdiction and class actions.

(c) The lower courts brought into the *Rooker-Feldman* doctrine claims that were not within the scope of the Alabama class action, and could therefore never have been challenged on appeal. For example, malpractice and fraud and RICO claims against the lawyers purporting to represent the class were never part of the Alabama class action, and could not have been added to it without wholesale amendments. Claims of malpractice in settling an underlying action are not barred by the settlement or by its approval by the court, and may be raised in a new action.[8]

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[8]Durkin v. Shea & Gould, 92 F. 3d 1510 (9th Cir. 1996)(class action), cert. petition pending; Diaz v. Sheppard, 85 F. 3d 1502 (11th Cir. 1996)(class action); Derrickson v. City of Danville, 845 F.2d 715 (7th Cir. 1988); Toporek v. Zepp, 1996 Ga. App. Lexis 1256 (Ga. App. 1996); McWhirt v. Heavey, 550 N.W.2d 327 (Neb. 1996); Grayson v. Wolsey, Rosen, Kweskin & Kuriansky,

Similarly, this Court has upheld independent federal actions seeking damages for unconstitutional service of process in state court actions without suggesting *Rooker-Feldman* problems.[9] And in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), six Justices agreed that *Rooker-Feldman* does not bar a state court defendant from clearing the way for an appeal by suing in federal court to challenge state appeal bond rules. 481 U.S. at 18, 21, 28, 31 n. 3. To bring the claims asserted in this case within *Rooker-Feldman* warps that doctrine from its rationale, the protection of this Court's appellate jurisdiction.

4. The lower courts in effect turned the *Rooker-Feldman* doctrine into a new federal common law of res judicata, inconsistently with 28 U.S.C. § 1738's command that state law determines the res judicata effect of a state court judgment in a federal action. This Court has made it clear that

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646 A.2d 195 (Conn. 1994); Cook v. Connolly, 366 N.W.2d 287 (Minn. 1985); *see* Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951)(ordinary preclusion rules relaxed in lawyer-client dispute because of lawyer's fiduciairy duties); Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1141-80 (1996). *But see* Laskey v. International Union, UAW, 638 F.2d 954 (6th Cir. 1981)(class members bound if no due process violation).

[9]Wyatt v. Cole, 504 U.S. 158 (1992); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

federal courts may not add to the res judicata effects of a state judgment prescribed by state law, except on the basis of a specific federal statutory policy.[10] Yet that is what happened in this case.

Unlike res judicata, *Rooker-Feldman* serves the limited purpose of preventing a party from starting a new action when it should have appealed through the state court sustem to this Court. To extend it to prevent an action by one over whom the state court had no jurisdiction, who could not have appealed without first being allowed to intervene, and who asserts claims never before the state court is a recipe fcr confusion and complexity. As the Seventh Circuit has expanded the *Rooker-Feldman* doctrine, it has struggled with little success to distinguish it from res judicata.[11] Scholars have suggested that the doctrine adds nothing of value to res judicata law.[12] The Fifth Circuit has held that *Rooker-*

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[10]*E.g.*, Johnson v. De Grandy, 114 S. Ct. 2647, 2654 (1994); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 384-86 (1985); Haring v. Prosise, 462 U.S. 317, 323 (1983).

[11]See, in addition to the opinion in this case, GASH Assoc. v. Village of Rosemont, 995 F.2d 726 (7th Cir. 1993); Nesses v. Shepard, 68 F. 3d 1003 (7th Cir. 1995); Garry v. Geils, 82 F. 3d 1362 (7th Cir. 1996).

[12]18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4469, at 663-68 (1981); Hart & Wechsler's The Federal Courts and the Federal System 1503-04 (4th ed. 1996); Jack M. Beermann, Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity, 68 B.U.L.

Feldman does not bar a federal action when the rendering state would allow a similar action. Davis v. Bayless, 70 F. 3d 367, 375-76 (5th Cir. 1995); *see* Robinson v. Ariyoshi, 753 F.2d 1468, 1471-73 (9th Cir. 1985), vacated on other grounds, 477 U.S. 902 (1986).

To the extent that the version of *Rooker-Feldman* applied below differs from res judicata, the differences are defects rather than advantages. (a) The lower courts' application of *Rooker-Feldman* gives state court judgments a far wider preclusive effect than res judicata law has traditionally recognized as desirable: it applies even when the state court lacked personal jurisdiction, when its judgment is not binding on class members who received inadequate representation, and when the federal court claim is one of malpractice in the state court proceeding. (b) Because the Seventh Circuit treats *Rooker-Feldman* as a matter of subject matter jurisdiction, a party may raise it without complying with Fed. R. Civ. P. 8(c)'s pleading requirements for res judicata, and appellate courts must search for and decide *Rooker-Feldman* issues

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Rev. 277, 341-42 (1988); Douglas Laycock, The Remedies Issues, 9 Rev. Litig. 473, 524-27 (1990); Note, The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of Federal District Courts, 42 Rutgers L. Rev. 859 (1990).

that no party has raised or argued.[13] (c) As already noted, Congress has directed in 28 U.S.C. § 1738 that state res judicata law, not a new system of federal common law, should govern the effect of state court judgments.

5. The egregious facts of this case accentuate the breadth and novelty of the lower courts' decision. Far from being a case in which refusal by a federal court to hear a claim might seem attractive, the federal court here was asked to remedy truly appalling misconduct. The defendants settled a class action in such a way that class members suffered a net loss; the notice failed to disclose that fact to the class; the class affected included hundreds of thousands of members; the forum state had no connection with the great bulk of the class members, and was also not the home state of the defendants; and the lawyers purporting to represent the class recovered from its members a fee of many millions of dollars for having injured it.[14] There was no need to

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[13]*E.g.*, Young v. Murphy, 90 F. 3d 1225 (7th Cir. 1996); Ritter v. Ross, 992 F.2d 750 (7th Cir. 1993), cert. denied, 114 S. Ct. 694 (1994).

[14]These are the facts alleged by the complaint, which at this stage must be taken as true; the defendant lawyers have admitted receiving $8.5 million in fees and costs. For discussion of the underlying facts, see Susan P. Koniak & George M. Cohen, note 8 *supra*, 82 Va. L. Rev. at 1057-81.

stretch traditional doctrines to protect those who did this.

CONCLUSION

Are all these far-reaching consequences really required by the law? That question calls for this Court's consideration. Certiorari should be granted.

Respectfully submitted,

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